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Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 152.

MARY C. ROBERTS, ADMINISTRATRIX, ET AL., *Petitioners*,

v.

UNITED FISHERIES VESSELS COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

History of Case.

This cause is before the Court upon the petition of Mary C. Roberts, Administratrix, *et al.*, appellants below, for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit to review a decision of that court (Rec. 40-48), which affirmed two final judgments of the United States District Court for the District of Massachusetts in favor of the respondent (R. 9, 11).

The case arises out of two civil actions brought against the respondent by the administratrices of the estates of Velmer Joseph Roberts and Samuel Cotreau. The petitioners' intestates were members of the crew of the fishing

schooner J. M. Marshall, owned by the respondent. On November 28, 1941, while the said schooner was at sea engaged in fishing with trawls, nine dories with two men in each left the vessel to set their trawls in accordance with the custom of trawl fishing. Eight of the nine dories safely returned to the vessel, but the ninth, in which were petitioners' intestates, did not return and could not be found after search (R. 20, 21). Petitioners' intestates were presumably drowned.

The above two actions were brought under Section 33 of the Merchant Marine Act of 1920 (41 Stat. 1007, 46 U.S.C. Sec. 688), commonly known as the Jones Act. The gravamen of the actions was the alleged negligence of the defendant, the sole issue being whether the captain of the J. M. Marshall was negligent in not giving an order to petitioners' intestates to return to the schooner, and, if so, whether that was the cause of the death of petitioners' intestates.

The two actions were tried together on May 13 and 14, 1943, before the District Court with a jury. All the witnesses appeared and testified at the trial in open court with the exception of the captain of the J. M. Marshall, whose testimony, taken by deposition, was offered in evidence (R. 20-32). After argument of counsel and the charge to the jury by the presiding judge, the case was submitted to the jury, which returned verdicts for the defendant in both actions, whereupon judgments for the defendant upon said verdicts after trial were duly entered on May 15, 1943 (R. 9, 11).

On July 12, 1943, the appeals of the petitioners to the Circuit Court of Appeals were perfected (R. 34). The two appeals were thereupon consolidated (R. 36) and were fully heard on January 4, 1944, by the Circuit Court of Appeals for the First Circuit on arguments and briefs of

counsel. After the argument of the appeal and due consideration, the Circuit Court of Appeals filed on March 20, 1944, its opinion affirming the judgments of the District Court and on the same day judgment thereon was entered (R. 48).

No petition for rehearing in the Circuit Court of Appeals was ever filed by either of the petitioners herein.

Statement of Facts.

The respondent is not content to accept the statement contained in the petition for a writ of certiorari which purports to be a statement of the facts of the case, in so far as it differs from the statement of facts contained in the opinion of the Circuit Court of Appeals.

The respondent particularly controverts the statement at the bottom of page 4 and the top of page 5 of the petition for a writ of certiorari, wherein it is stated that, "in accordance with the understanding of the dory fishing industry, the fishermen were under orders to remain out in their dories until they finished their job of 'making a set' before returning to the vessel; that if they cut their trawl-lines and returned to the vessel before completing their job of 'making a set', they would be acting in disobedience of orders, unless a flag was hoisted in the rigging of the vessel . . ."

The record shows that there was a conflict of testimony as to whether the fishermen were required to remain out in their dories until they had completed "making a set" unless a flag was hoisted in the rigging of the vessel. Nine witnesses in all were examined at the trial, three of whom testified that no disobedience to orders was involved if the men returned to the vessel before completing their "set," even though no orders were given to return.

Purdy, who had been captain of the J. M. Marshall, testified that the men use their own judgment about returning to the vessel (R. 32). Cameron, who had been following the dory fishing business for about sixty years, testified that "a man in a dory uses his own judgment as to when to come back to the vessel and does not wait for a signal from the captain" (R. 31). Nowe testified that "it is up to the men in the dory to determine how much fish to place in a dory. As a rule, the captain puts a flag in the rigging if it becomes dangerous" (R. 30). All of these witnesses were members of the crew of the J. M. Marshall at the time petitioners' intestates were lost. Hynes, captain of the J. M. Marshall, testified that it is customary in the dory fishing industry for the captain to put a flag in the rigging if he wants the men to come back before completing their work (R. 21), but he did not testify that the men could not use their own judgment and return to the vessel whenever they wished to do so. In its opinion, the Circuit Court of Appeals referred to this conflict of testimony (R. 44).

As the sole issue in the case was whether the captain of the J. M. Marshall was negligent in not setting a flag to call the men in, the failure of petitioners to refer to the conflict of testimony as to whether the fishermen were under orders not to return to the vessel until they had made their "set" unless a flag was hoisted in the rigging calls for correction of petitioners' misstatement of the facts.

Argument.

First Point.

Neither the reasoning nor the decision of the Circuit Court of Appeals as it relates to the standard of care in seamen's actions under the Jones Act was in conflict with the decisions of this Court or with decisions of any Circuit Court of Appeals.

As the Circuit Court of Appeals points out, the trial court "charged the jury that the applicable standard of care was that of an ordinarily careful and prudent ship's master under the circumstances then present" (R. 42). The Circuit Court of Appeals then quotes the language used by the trial court in charging the jury as to the standard of care required of the captain of the J. M. Marshall (R. 42) and states that the "appellants cannot complain of these instructions, nor of other parts of the charge of the same tenor" (R. 42).

In fact, the petitioners admit that this is so, for they say: ". . . the petitioners agree that the actions of a reasonably prudent and careful captain is the standard of care under the Jones Act . . ." (Brief in Support of Petition, p. 10). This, we submit, disposes of Point I of petitioners' argument.

While no further argument by respondent seems required to show that there is no basis for the first reason given by petitioners as a ground for granting a writ of certiorari in this case, we wish to point out that petitioners' statement at the bottom of page 10 and top of page 11 of their brief that "they specifically requested that the trial court further instruct the jury so that the jury could determine what a reasonably prudent and careful captain would, or would not have done, under the circumstances" is not a correct statement of fact. The record shows that

no such request was made. Furthermore, such a request if made, should have been refused. The court having, by petitioners' admission (Petitioners' Brief, p. 10), properly instructed the jury as to the standard of care required of the captain of the vessel, had no right to instruct the jury as to what the captain should, or should not, have done under the existing circumstances. That determination was wholly the province of the jury to make on the evidence in the case, and it would have been clear error on the part of the trial court to invade the functions of the jury by expressing the court's opinion as to whether the captain, under the circumstances, should, or should not, have ordered the men to return.

The statement made by petitioners on page 11 of their brief that "the jury was instructed that it was for them to decide what duty was owed by the respondent to the petitioners' intestates" is incorrect. The trial judge instructed the jury as to "the specific duty that they [defendant] owed these plaintiffs, or, rather, owed the seamen, and these fishermen are seamen, to give them a reasonably safe place to work and reasonably safe tools and appliances with which to work and reasonably safe fellow employees" (R. 13).

The fact that the trial court, notwithstanding the conflict of testimony as to whether the dorymen could exercise their own judgment about returning to the vessel, charged the jury to find for the petitioners if it found that an ordinarily careful and prudent and reasonable captain would have called his men back and the captain in this case failed to do so *for any reason whatsoever* (R. 14, 42) was particularly favorable to the petitioners.

The captain of the J. M. Marshall testified that "it was not so bad, you know, to put a flag in the rigging. I did not think it was that bad to call them in until the dories were

coming in with their trawls" (R. 21). He also testified that "the men came back to the vessel when their work was done" (R. 21). The fact that all the other dories, with their loads of fish, returned safely to the vessel (R. 21) gives rise to the inference that petitioners' intestates were lost because they overloaded their dory, or, in some manner wholly unconnected with any negligence of respondent's captain, caused their dory to capsize.

The decisions of this Court and of the Circuit Court of Appeals for the Second, Third and Fourth Circuits, referred to at pages 11-17 of petitioners' brief, are not in conflict with the decision of the Circuit Court of Appeals in this case.

Cortes v. *Baltimore Insular Line*, (1932) 287 U.S. 367, dealt with the failure of a shipmaster to furnish proper medical care to a seaman who had contracted pneumonia. The issue was whether the Jones Act required the master to furnish medical attention inasmuch as the Federal Employers' Liability Act did not require employers of railway employees to furnish medical aid.

Socony-Vacuum Oil Co., Inc. v. *Smith*, (1939) 305 U.S. 424, was a case of personal injury to a seaman caused by a defect in the equipment of the ship.

The Arizona v. *Anelich*, (1936) 298 U.S. 110, dealt with an action to recover for the death of a fisherman caused by a defective winch which he was operating. The case turned on the question of whether the decedent assumed the risk of operating the defective appliance.

Calmar S.S. Corp. v. *Taylor*, (1938) 303 U.S. 525, dealt wholly with the extent of the legal duty to furnish care and maintenance to a sick seaman. The question of negligence was not an issue.

In *Chelentis* v. *Luckenbach S.S. Co.*, (1918) 247 U.S. 372, the sole issue was whether Section 20 of the Merchant

Marine Act of 1915 changed the rule as to the right of a seaman to recover an indemnity for the negligence of the master.

The issue in *Jamison* v. *Encarnacion*, (1930) 281 U.S. 635, was whether the term "negligence" as used in the Federal Employers' Liability Act included an assault on a member of the crew by a foreman in charge.

Alpha S.S. Corp. v. *Cain*, (1932) 281 U.S. 642, was a case of assault upon a seaman, wherein, following *Jamison* v. *Encarnacion*, it was held that an assault is negligence within the meaning of the Federal Employers' Liability Act.

In *Warner* v. *Goltra*, (1935) 293 U.S. 155, the issue was whether the words "any seaman" in the Jones Act includes the master of the vessel, so as to entitle the master to sue for personal injuries caused by negligence of a pilot employed by the owner of the vessel.

The issue in the case of *Harris* v. *Penn R. Co.*, (1931) 50 F. (2) 866, was whether there was any legal duty to rescue a seaman who had fallen overboard through his own negligence.

Armit v. *Loveland*, (1940) 115 F. (2) 308, was an action to recover for injuries caused by defective equipment of the ship, viz., absence of splash plates which permitted oil to escape and cause a ladder to become slippery. The language of the court quoted at pages 15-16 of petitioners' brief relates solely to the care required in supplying proper equipment.

Storgard v. *France & Canada S.S. Corp.*, (1920) 263 F. 545, was an action for indemnity brought under the general maritime law for an injury caused by alleged unseaworthiness of the vessel, viz., a defective bolt in a mast band. The language of the court quoted on page 16 of petitioners' brief refers only to the degree of care required of employers of seamen with respect to supplying the ship with proper equipment.

The following excerpt from the opinion of the Circuit Court of Appeals in this case correctly summarizes the decisions relied upon by the petitioners. The court said (R. 46-47):

> "It should be noted that no question of unseaworthiness of the vessel or defective equipment of the vessel or her dories is involved here. Most of the numerous decisions in the books, including those relied upon by the plaintiffs, are concerned with the use of appliances furnished or under the control of the employer, and are not applicable."

At page 16 of their brief, petitioners quote a sentence from the opinion of the Circuit Court of Appeals in this case which appears on page 43 of the record and not page 44 as stated in petitioners' brief. It is obvious that the petitioners have misconstrued this sentence in contending, as they do, that no distinction was drawn by the Circuit Court of Appeals between actions arising on land and actions under the Jones Act. While it is true that the standard of required care remains the same in all cases, whether on land or on the sea, the nature of the business and the particular dangers involved determine the amount of care required whether the case arises on land or on the sea and this is what the Circuit Court of Appeals correctly pointed out in accordance with the well settled law.

As the Circuit Court of Appeals stated in its opinion (R. 43): "The test or standard to be adopted in determining whether the care used is proper and commensurate with the danger is the supposed conduct under the circumstances of a reasonable and prudent man. Failure to use the care that a reasonable and prudent man would use under like circumstances is the usual concept of negligence."

In other words, the circumstances arising at sea determine the care required of a shipmaster and the circumstances arising on land determine the care required of an employer of land employees. The standard remains the same in both cases.

The decisions referred to of the Circuit Court of Appeals (R. 43-44), including the recent decision of this Court in *Tiller* v. *Atlantic Coast Line R. Co.*, (1943) 318 U.S. 54, are entirely in accord with and are authority for the decision of the Circuit Court of Appeals in this case.

Second Point.

Neither the reasoning nor the decision of the Circuit Court of Appeals relative to the matter of assumption of risk was in conflict with any decision of this Court or of any Circuit Court of Appeals.

The petitioners' second and final reason submitted for the allowance of their petition is based on a misconception of the decision of the Circuit Court of Appeals and of respondent's position in this case.

Neither the court nor the respondent took the position that assumption of risk was a defense if there was any negligence whatsoever on the part of respondent.

The Circuit Court of Appeals said (R. 47):

> "The presence or absence of negligence governs the verdict. If there is no negligence the plaintiff cannot recover. If the defendant is negligent he cannot avoid the effect of it by pleading assumption of risk. Such a defense is absolutely 'out of the window' since the statute and since the decision in *Tiller* v. *Atlantic Coast Line Co.*, 318 U.S. 54."

Again, the court said (R. 47):

> "The only question raised in this case, and the one properly submitted to the jury, was whether the captain was negligent in not giving an order, and, if so, whether that was the cause of the accident."

The court also said (R. 46):

> "The defense called 'assumption of risk' can no longer be made in an action controlled by the applicable provisions of the Federal Employers' Liability Act, Section 54 . . ."

Likewise, respondent has conceded throughout the case that Section 54 of the Federal Employers' Liability Act, by its express terms, abolished the defense of assumption of risk where the injury or death resulted in whole or in part from the negligence of the defendant or of those for whose acts it was responsible.

The Circuit Court of Appeals also pointed out in its opinion (R. 47) that the trial judge properly charged the jury that petitioners' intestates did not assume any risk if there was negligence on the defendant's part.

The record contains clear and specific statements by both the trial court and the Circuit Court of Appeals that the only issue in the case was whether the captain was negligent in not ordering the men to return to the vessel and, if so, whether that was the cause of the loss of life. The record also contains the further statements by both courts that assumption of risk was no defense if the defendant was negligent.

Notwithstanding this, petitioners contend (Petitioners' Brief, p. 20) that the Circuit Court of Appeals "apparently adopted a particular feature of the concurring opin-

ion of Mr. Justice Frankfurter in the case of *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, regarding assumption of risk, which was contrary to that expressed in the majority opinion of this Honorable Court."

It requires no argument to show that the excerpt from Mr. Justice Frankfurter's concurring opinion in the Tiller case is not at variance with the opinion of the Court in the same case delivered by Mr. Justice Black. Both opinions are also in harmony with the decisions of this Court in *The Iroquois*, (1904) 194 U.S. 240, *The Arizona* v. *Anelich*, (1935) 298 U.S. 110, and *Socony-Vacuum Oil Co., Inc.* v. *Smith*, (1939) 305 U.S. 424, in all of which decisions this Court held that, in the absence of negligence on the part of the employer, a seaman assumes the ordinary risks incidental to a seafaring life.

Conclusion.

The respondent respectfully submits that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

ALBERT T. GOULD,

Counsel for Respondent.